

# Exhibit 9

UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS,

HODES & NAUSER, MD's, PA,  
et al.,

Docket No. 11-2365-CM

Plaintiff,

Kansas City, Kansas

Date: 7/1/11

v.

ROBERT MOSER, et al,

Defendants.

.....

TRANSCRIPT OF  
TEMPORARY RESTRAINING ORDER HEARING  
BEFORE THE HONORABLE CARLOS MURGUIA,  
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: Teresa A Woody  
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Kansas City, MO 64108

Bonnie Scott Jones  
Center for Reproductive Rights - NY  
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For the Defendants: Jeffrey A Chanay & Steve R Fabert  
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Movant: Cheryl A Pilate  
Morgan Pilate LLC  
142 N Cherry  
Olathe, KS 66061

Court Reporter: Nancy Moroney Wiss, CSR, RMR, FCRR  
Official Court Reporter  
558 US Courthouse  
500 State Avenue  
Kansas City, KS 66101

15:03:16 1 THE COURT: Give me a moment please just to  
15:03:18 2 set up here. Let the record show we're here regarding  
15:03:44 3 Case Number 11-2365. It's a case entitled -- may have  
15:03:53 4 to help me with the pronunciation of the plaintiffs'  
15:03:55 5 names.

15:03:55 6 MS. WOODY: Doctors Hodes and Nauser.

15:03:59 7 THE COURT: Hodes and Nauser versus Moser,  
15:04:04 8 et al. Would the parties please enter their appearance?

15:04:06 9 MS. WOODY: Your Honor, Teresa Woody on  
15:04:08 10 behalf of the plaintiffs, and here are Doctor Hodes and  
15:04:11 11 Doctor Nauser, and with me is Bonnie Scott Jones who's  
15:04:14 12 been admitted pro hac vice this morning.

15:04:17 13 THE COURT: Thank you.

15:04:19 14 MR. CHANAY: Your Honor, on behalf of the  
15:04:21 15 defendant, it's Jeffrey Chanay, Deputy Attorney General  
15:04:24 16 of Kansas, and with me is Steve Fabert, Assistant  
15:04:27 17 Attorney General.

15:04:28 18 THE COURT: Thank you. Appreciate the  
15:04:29 19 parties accommodating the court with the scheduling of  
15:04:32 20 this hearing on very short notice. There is something  
15:04:36 21 before and pending at this time, which would be  
15:04:40 22 plaintiffs' motion for temporary restraining order  
15:04:44 23 and/or preliminary injunction, which is Document Number  
15:04:48 24 Four. This morning, the court granted Aid For Women's  
15:04:53 25 motion to intervene as well as Aid for Women has filed a

15:04:58 1 motion to join plaintiff's motion for temporary  
15:05:01 2 restraining order and/or preliminary injunction, which  
15:05:04 3 is Document 27. Upon review of the motion, the court  
15:05:09 4 grants Aid for Women's motion. As a result, for our  
15:05:14 5 record, Miss Pilate, if you could enter your appearance  
15:05:19 6 as well here at this hearing.

15:05:20 7 MS. PILATE: Thank you, Your Honor. Good  
15:05:22 8 afternoon. Cheryl Pilate for intervenors Central Family  
15:05:27 9 Medical, LLC, doing business as Aid for Women, and also  
15:05:31 10 representing Doctor Ronald Yeomans who is present with  
15:05:34 11 me at counsel table. Thank you.

15:05:38 12 THE COURT: In regards to our court  
15:05:39 13 appearance this afternoon, the court has scheduled this  
15:05:43 14 to be heard, but with that, there's some time  
15:05:47 15 limitations the court has informed the parties about  
15:05:51 16 regarding their arguments or however you want to use  
15:05:55 17 your time. Hopefully, you both were -- all of you were  
15:05:58 18 informed, and you have 30 minutes per party, and we  
15:06:04 19 actually have set up a timer that will be placed in  
15:06:09 20 front of the podium that I would trust and ask that you  
15:06:14 21 monitor and keep track of, and what I'll do is let you  
15:06:19 22 know if you want a warning when you're about to have  
15:06:22 23 your time expire. I would request please that when that  
15:06:26 24 timer shows that you have zero time remaining, that you  
15:06:29 25 stop. If not, I will have to interrupt you with

15:06:33 1 whatever is being presented or being argued. Yes?

15:06:37 2 MS. WOODY: Your Honor, we would like to  
15:06:39 3 divide the argument and provide at least a short period  
15:06:42 4 of time for intervenors to make a comment to the court  
15:06:46 5 with respect to the argument.

15:06:48 6 THE COURT: That's fine. If there's nothing  
15:06:50 7 else, we'll start at this time. Miss Woody.

15:06:54 8 MS. WOODY: Good afternoon, Your Honor. May  
15:07:03 9 it please the court. We are here on behalf of Doctors  
15:07:07 10 Hodes and Nauser requesting injunctive relief of the  
15:07:10 11 licensing process and temporary regulations promulgated  
15:07:14 12 under Senate Bill 36. Doctor Hodes and Doctor Nauser  
15:07:17 13 are very well respected physicians with a clinic located  
15:07:21 14 in Overland Park, Kansas where they operate an  
15:07:24 15 obstetrics and gynecology practice. Doctor Hodes has  
15:07:28 16 been practicing in this field for over 30 years. Doctor  
15:07:32 17 Nauser has been practicing with Doctor Hodes for  
15:07:35 18 13 years, and he is her father. Doctor Nauser and  
15:07:39 19 Doctor Hodes have a full OB/GYN practice which includes  
15:07:43 20 a full range of services including gynecological  
15:07:47 21 surgeries. They also perform abortions in their  
15:07:49 22 practice, and especially are referred to by other  
15:07:52 23 physicians in instances where there are complications,  
15:07:54 24 medical complications for the woman, or where there is a  
15:08:00 25 fetal anomaly that would require an abortion. They have

15:08:06 1 been providing these services at their same clinic in  
15:08:09 2 Overland Park for over 24 years without incident. Since  
15:08:13 3 2002, their practice like all other practices in the  
15:08:16 4 state of Kansas where office surgeries are performed in  
15:08:21 5 a physician's office have been regulated by the Kansas  
15:08:25 6 Board of Healing Arts, which in 2002 had a panel of some  
15:08:28 7 35 doctors who promulgated standards for offices in  
15:08:32 8 Kansas where office surgeries were performed. With  
15:08:37 9 respect to these regulations which apply to all surgical  
15:08:40 10 procedures and offices, whether -- not just abortions,  
15:08:43 11 but other procedures for dental procedures,  
15:08:49 12 gastroenterology, all those sorts of surgeries that can  
15:08:51 13 be performed in an outpatient basis at a doctor's  
15:08:54 14 office, many of which are far more risky and invasive  
15:08:59 15 than abortion procedures performed at Doctor Hodes and  
15:09:02 16 Doctor Nauser's office, they've been regulated under  
15:09:04 17 these -- these standards promulgated by the board of  
15:09:07 18 healing arts for some eight years, and they are  
15:09:10 19 inspected routinely with respect to these procedures by  
15:09:13 20 representatives of the Kansas Board of Healing Arts.

15:09:19 21 On May 16th of this year, however, the  
15:09:22 22 Kansas legislature enacted Senate Bill 36, and under  
15:09:25 23 that bill, said that it would become effective July 1st,  
15:09:30 24 and that anyone who was not licensed, any provider who  
15:09:33 25 was not licensed as of that date would not be allowed to

15:09:36 1 perform abortions, and that any abortions performed  
15:09:39 2 after that date without a license would be considered a  
15:09:41 3 crime. KDHE was charged with implementing regulations  
15:09:45 4 under that act, and it is those temporary regulations  
15:09:49 5 and the licensing procedure that we are asking the court  
15:09:52 6 to enjoin today.

15:09:55 7 That occurred on May 16th, the act was  
15:09:59 8 enacted. Doctor Hodes and Doctor Nauser immediately  
15:10:01 9 reached out to the KDHE to say it's going to be  
15:10:04 10 impossible for you to both promulgate regulations and  
15:10:08 11 give the providers an opportunity to comply in a very  
15:10:11 12 limited time before July 1st. They basically heard  
15:10:15 13 nothing until May 26th when they were told that  
15:10:18 14 temporary regulations would be forthcoming. On July  
15:10:22 15 9th, they did receive a copy of draft regulations from  
15:10:26 16 the KDHE.

15:10:26 17 THE COURT: June 9th? June 9th?

15:10:29 18 MS. WOODY: June 9th. I'm sorry, on  
15:10:31 19 June 9th, they received -- they received the draft of  
15:10:33 20 the temporary regulations from the KDHE, and these  
15:10:37 21 imposed stricter regulations, more stringent regulations  
15:10:41 22 on their facility than had previously been -- that they  
15:10:44 23 had previously been subject to under the standards of  
15:10:48 24 the board of healing arts. They were also told that  
15:10:52 25 they would have a licensing application, that the

15:10:55 1 licenses would -- application would be available on  
15:10:57 2 June 13th, and that they were to have their -- their  
15:11:00 3 license application submitted no later than June 17th.  
15:11:04 4 On June 13th, in the intervening time-frame, they -- in  
15:11:09 5 addition to getting the license application, they also  
15:11:11 6 received notice that the regulations, the draft  
15:11:14 7 regulations they had initially been provided on June 9th  
15:11:17 8 were being revised, and that they would get revised  
15:11:20 9 copies of those regulations at some point in the future,  
15:11:23 10 those temporary regulations.

15:11:26 11 That occurred after they had actually  
15:11:29 12 submitted their application on June 17th, as was  
15:11:32 13 required procedurally. They then received on the  
15:11:35 14 morning of June 20th new regulations that -- new  
15:11:39 15 temporary regulations and were told that these temporary  
15:11:42 16 regulations would be the ones that would be applied to  
15:11:44 17 determine whether they were able to get a license on  
15:11:47 18 July 1st. These new regulations were far more stringent  
15:11:51 19 even than the draft regulations that had been provided  
15:11:55 20 to them on June 9th. They had extremely strict  
15:11:58 21 standards, provided, for instance, for two hours of  
15:12:01 22 recovery for any patient of an abortion procedure, an  
15:12:05 23 amount of recovery time far in excess of anything  
15:12:08 24 required either at the Kansas hospitals or Kansas  
15:12:12 25 ambulatory surgical centers for much more invasive and



15:12:16 1 risky surgical procedures. They also imposed extremely  
15:12:19 2 strict physical plan regulations mandating the size of  
15:12:24 3 the rooms in which procedures could be performed,  
15:12:26 4 mandating that each room have its own washing -- hand  
15:12:30 5 washing and facilities, sink and a lavatory by itself  
15:12:34 6 attached to each procedure room, and standards such as  
15:12:37 7 requiring 50 square feet of janitorial storage for each  
15:12:41 8 procedure room which for the Hodes practice and Nauser  
15:12:45 9 practice would have meant 350 square feet of janitorial  
15:12:48 10 storage alone.

15:12:51 11           Upon reviewing these regulations, Doctor  
15:12:55 12 Hodes and Doctor Nauser reached out to the KDHE, and  
15:12:58 13 asked if there would be waivers available, because it  
15:13:01 14 was impossible for them to comply by July 1st. It would  
15:13:06 15 have required them essentially to tear down their  
15:13:08 16 building and re-build it, totally reconfigure it and --  
15:13:12 17 and make it larger. They were told there would be no  
15:13:16 18 waivers, and that they -- if they were -- failed to be  
15:13:19 19 in compliance by July 1st, their license would be  
15:13:22 20 denied. This is inconsistent with the way other Kansas  
15:13:25 21 state regulations have been applied, particularly ones  
15:13:27 22 for hospitals where when there's a change in the  
15:13:29 23 physical plan for a hospital facility, they've been  
15:13:32 24 given up to two years to make those changes. But for  
15:13:35 25 these providers, and there are only three providers of

15:13:38 1 abortions in the state of Kansas that were affected by  
15:13:40 2 these, for these three providers, there was a -- they  
15:13:43 3 were to comply with these regulations within nine days  
15:13:46 4 of having received these regulations or their license  
15:13:49 5 would be denied.

15:13:52 6 Obviously, there was an inspection scheduled  
15:13:55 7 for even sooner than that. The original inspection was  
15:13:57 8 scheduled for June 27th, and they asked to have that  
15:14:02 9 moved until June 29th, but even so, recognized that it  
15:14:06 10 would be totally impossible for them to comply with  
15:14:08 11 these regulations, come the physical plan status alone,  
15:14:14 12 and so, they have moved this court for temporary  
15:14:17 13 injunction. They knew there's -- the state has raised  
15:14:20 14 an argument that there's some potential waiver because  
15:14:23 15 they didn't go through and exhaust their administrative  
15:14:27 16 remedies, but there was absolutely no purpose for them  
15:14:30 17 going in that manner. They'd all ready been told that  
15:14:32 18 they would not get a waiver, and they knew that they  
15:14:35 19 would not be able to comply with those regulations by  
15:14:37 20 July 1st.

15:14:38 21 And indeed, this morning, even though this  
15:14:42 22 motion for temporary restraining order and preliminary  
15:14:44 23 injunction was pending before this court, they received  
15:14:46 24 from the KDHE notice of intent to deny their license  
15:14:50 25 which came in at about 10:15 or 10:30 this morning.

15:15:00 1 It's clear that these regulations -- these temporary  
15:15:03 2 regulations and this licensing process infringe on the  
15:15:08 3 plaintiff's due process. There is absolutely no way  
15:15:13 4 that they could have complied with this -- with these  
15:15:16 5 requirements in the very limited, very quick time-frame  
15:15:20 6 provided to them, and there was absolutely no way that  
15:15:24 7 they were going to be able to continue providing  
15:15:28 8 services to women who needed those services without --  
15:15:33 9 without -- they simply would have to close, and indeed  
15:15:36 10 they were denied a license, and now are unable to  
15:15:38 11 provide those -- those abortions at their facility under  
15:15:43 12 the licensing today.

15:15:45 13 So, it's clear that there's irreparable harm  
15:15:48 14 to them, there's irreparable harm to the women that they  
15:15:52 15 serve. For instance, just in the last couple of days --  
15:15:55 16 and we've submitted this in our supplemental declaration  
15:15:57 17 of Doctor Hodes -- just in the last couple of days, he  
15:16:00 18 has been referred patients by referring physicians  
15:16:04 19 because of his expertise in this area where there were  
15:16:07 20 serious medical conditions for the woman or a medical  
15:16:12 21 anomaly for the fetus, in both of those instances, he  
15:16:16 22 has been unable to perform the abortions that the  
15:16:20 23 referring physician requested because these regulations  
15:16:24 24 are now in place. This has put these women in a  
15:16:28 25 position where they are unable to get the medical

15:16:31 1 treatment they need in the state of Kansas, and so,  
15:16:34 2 despite the -- despite the state's argument that this  
15:16:38 3 will heighten medical processes and medical procedures  
15:16:45 4 for women in Kansas, it in fact is denying women who  
15:16:49 5 very much need these services, the ability to access an  
15:16:53 6 abortion in Kansas, because they can't get them at  
15:16:56 7 Planned Parenthood, and Doctor Hodes and the referring  
15:16:59 8 physicians are unaware of any other abortion provider  
15:17:02 9 who can provide those services in the state of Kansas  
15:17:05 10 for women who have these kind of complications or these  
15:17:08 11 kind of fetal anomalies.

15:17:11 12 So, there is -- there -- you can quickly see  
15:17:15 13 that there is an undue burden both on the doctors and on  
15:17:18 14 the patients who are unable to access these procedures,  
15:17:22 15 even though they need them. In addition, it is clear  
15:17:27 16 that these regulations really were designed to make  
15:17:32 17 access to abortion more difficult in the state of  
15:17:34 18 Kansas.

15:17:35 19 Now, the state tries to argue that because  
15:17:37 20 they have granted Planned Parenthood a last minute  
15:17:42 21 license, that -- that there is adequate access, and  
15:17:46 22 there isn't a problem with the regulations, and they  
15:17:48 23 cite to the court the Greenville case, and say that  
15:17:51 24 regulations on facilities are okay, and basically imply  
15:17:56 25 that anything that the state wants to do, any kind of

15:17:58 1 regulations that the state wants to impose should not be  
15:18:04 2 unconstitutional.

15:18:07 3 We've cited to the case -- a case very  
15:18:09 4 similar to this in 2007 where Judge Smith in the Western  
15:18:13 5 District of Missouri, in examining some regulations  
15:18:15 6 very, very similar to those here, only those here are  
15:18:18 7 actually even more onerous and more burdensome than the  
15:18:22 8 ones that were being addressed by the court with the  
15:18:27 9 Missouri regulations, he did find that there was both a  
15:18:30 10 likelihood that it violated plaintiff's due process, and  
15:18:34 11 that it imposed an undue burden on both the doctors and  
15:18:37 12 the women with respect to the constitutionality of those  
15:18:41 13 regulations, and granted a preliminary injunction on  
15:18:44 14 that matter.

15:18:46 15 If you look at the regulations in the chart  
15:18:49 16 that we've provided, you can see that the regulations  
15:18:51 17 far exceed anything that is required for Kansas  
15:18:56 18 ambulatory surgical centers, for Kansas hospitals, and  
15:19:00 19 certainly, even the case that they cite, the Greenville  
15:19:03 20 versus South Carolina case, the regulations in those  
15:19:07 21 cases -- in that case, the physical regulations were far  
15:19:10 22 less stringent, far less onerous, far less specific and  
15:19:15 23 particular than we have here in the -- in the case of  
15:19:17 24 these temporary regulations with respect to Kansas.

15:19:20 25 So, there clearly is, we believe, a showing

15:19:24 1 of irreparable harm on behalf of the plaintiffs and the  
15:19:28 2 doctors and their patients, and that's balanced against  
15:19:31 3 any harm to the state in continuing things the way they  
15:19:35 4 are, continuing the status quo.

15:19:37 5 And we submit that there really is no -- no  
15:19:41 6 injury to the state whatsoever in continuing things the  
15:19:44 7 way they were. The facilities are all ready regulated.  
15:19:48 8 They're regulated like any other facility that provides  
15:19:51 9 surgical procedures at a doctor's office under the  
15:19:56 10 standards developed by the Kansas Board of Healing Arts.  
15:19:59 11 They have been in compliance with those standards,  
15:20:01 12 they've been performing procedures like this at their  
15:20:04 13 office for over 24 years. If the injunction is put in  
15:20:07 14 place, they will still be subject to those regulations  
15:20:10 15 by the board of healing arts, and still be subject to  
15:20:13 16 those inspections and still be subject to the high  
15:20:16 17 standards of medical care for women that those standards  
15:20:19 18 impose on all providers of surgical procedures in a  
15:20:23 19 doctor's office. This is -- this has been going on for  
15:20:27 20 eight years. They've had no issues with that. And they  
15:20:31 21 will continue to have that oversight by the Kansas Board  
15:20:36 22 of Healing Arts if this injunction is granted. So,  
15:20:41 23 there is really no detriment to the state.

15:20:44 24 On the other hand, the detriment to the  
15:20:45 25 doctors both in having to shut down that part of their

15:20:49 1 practice, to lose the revenue from that part of their  
15:20:52 2 practice, to lose patients, and in the patients  
15:20:56 3 themselves from their inability to access these  
15:20:58 4 services, is -- is very much impacted. And the fact  
15:21:02 5 that there's one abortion provider that's licensed in  
15:21:09 6 the state of Kansas is not sufficient to meet the needs  
15:21:11 7 of those women, and to in effect spirit away the undue  
15:21:15 8 burden, Doctors -- Doctor Hodes and Nauser perform some  
15:21:20 9 25 percent of the abortions in the state of Kansas.  
15:21:23 10 It's -- it is really -- it's imaginary -- it's -- it's  
15:21:29 11 imaginary to presume that the women who otherwise were  
15:21:32 12 treated by them can simply go to Planned Parenthood just  
15:21:36 13 as it would be if -- as we said in our briefs, if there  
15:21:39 14 was only -- if you had three hospitals, and went down to  
15:21:41 15 one hospital, and said, well, that's fine, because  
15:21:43 16 everybody who went to the other two hospitals can just  
15:21:45 17 go to the first one. There simply isn't enough --  
15:21:49 18 enough, there aren't enough providers, and there simply  
15:21:53 19 isn't the expertise at the Planned Parenthood facility  
15:21:57 20 for some of the more serious complications that Doctors  
15:22:00 21 Hodes and Nauser treat.

15:22:01 22 So, the fact that there's one -- one  
15:22:04 23 facility left in the state that's licensed does not take  
15:22:07 24 away either the -- does not take away the undue burden  
15:22:10 25 for -- for women who are seeking these procedures. So,

15:22:16 1 it's clear that there's irreparable harm to the doctors  
15:22:19 2 and to their patients. It's clear that there is not any  
15:22:25 3 sort of irreparable harm to the state. Status quo will  
15:22:28 4 be maintained. They'll be able to regulate these  
15:22:32 5 providers just as they have been doing, and in the --  
15:22:35 6 they'll have -- they can go through the regular  
15:22:37 7 licensing process and -- and develop what happens there.

15:22:42 8 There's no medical emergency, no health  
15:22:46 9 emergency that mandates that these regulations have to  
15:22:49 10 go into effect on July 1st as they're currently drafted.  
15:22:52 11 There's no reason to believe that they should go into  
15:22:55 12 effect without waivers.

15:22:57 13 And there's -- then there's the public  
15:23:00 14 interests, and as we've just cited to the court, there's  
15:23:02 15 ample interest in the public in having these -- this  
15:23:06 16 facility open to the public so that they can obtain  
15:23:10 17 abortion procedures there. Abortion is a lawful  
15:23:14 18 procedure. And -- and these doctors are highly  
15:23:18 19 experienced doctors that provide sophisticated services  
15:23:21 20 to some women with the most serious complications that  
15:23:26 21 require abortions.

15:23:29 22 Finally, likelihood of success. Clearly, I  
15:23:33 23 don't see how there can be any question that there is --  
15:23:36 24 that they're likely to prevail on their due process  
15:23:42 25 claim. And again, we would draw the court's attention



15:23:45 1 to Judge Smith's opinion in the Planned Parenthood case  
15:23:49 2 in the Western District of Missouri where he clearly  
15:23:52 3 found that there -- the same kind of thing, where there  
15:23:54 4 were no waivers implemented, very strict -- very strict  
15:23:58 5 physical plan requirements implemented with no  
15:24:01 6 opportunity for waivers and no ample time-frame to meet  
15:24:05 7 those, that that was an infringement on the plaintiff's  
15:24:10 8 due process, and that he believed it likely that -- that  
15:24:14 9 those statute -- those regulations would be  
15:24:16 10 unconstitutional under the due process clause.

15:24:20 11 Finally, there is the likelihood of success,  
15:24:25 12 the merits of undue burden, and it was -- as we've just  
15:24:28 13 outlined, there is an undue burden both to the plaintiff  
15:24:30 14 doctors and to plaintiffs seeking abortion in the state  
15:24:33 15 of Kansas if these regulations are not enjoined.

15:24:37 16 I'm going to turn my time over now to  
15:24:39 17 intervenors to -- to take a -- to explain to the court  
15:24:46 18 their position and how it might differ from ours, but we  
15:24:49 19 are respectfully asking this court to enter -- to enter  
15:24:52 20 injunctive relief, enjoining the licensing process and  
15:24:56 21 the temporary regulations currently promulgated under  
15:25:00 22 Senate Bill 36. Thank you.

15:25:07 23 MS. PILATE: Thank you, Your Honor. I will  
15:25:10 24 be fairly brief. I'd like to say at the outset that we  
15:25:13 25 would like to adopt and incorporate into our argument

15:25:18 1 all of the arguments so ably made by Miss Woody and her  
15:25:23 2 co-counsel both in their pleadings and in the oral  
15:25:26 3 argument. Your Honor, I'd like to say at the outset  
15:25:33 4 that my clients are concerned about the health and  
15:25:38 5 safety of women, but that's not what these regulations  
15:25:42 6 are about. If these regulations were about the health  
15:25:46 7 and safety of women, they might contain something to  
15:25:51 8 address the one part of the process where this very  
15:25:56 9 vulnerable population that my clinic serves might suffer  
15:26:01 10 some harm, which is between the parking lot and the  
15:26:04 11 front door. And it is during that passage when they  
15:26:08 12 suffer the screamers, the shouters, the hecklers who are  
15:26:13 13 saying things that I won't repeat. But when they make  
15:26:16 14 it to the clinic, that is their safe place. It is the  
15:26:21 15 parking lot to the front door that poses the risk, not  
15:26:25 16 the clinic. Your Honor, my client is the only provider  
15:26:33 17 in Wyandotte County. They serve a vulnerable  
15:26:36 18 under-served population that needs access to affordable  
15:26:42 19 services. These regulations, like so many decisions by  
15:26:48 20 governments, business, and other entities fall most  
15:26:54 21 heavily and burden the most poor women. The vast  
15:26:59 22 majority, between 90 and 95 percent of the people that  
15:27:04 23 my clinic serves are poor women. A good half, maybe a  
15:27:08 24 little bit more are African American and Latino. The  
15:27:13 25 Latino part is very important, because my clinic has

15:27:16 1 three bilingual staff members, and as far as I know, it  
15:27:21 2 is the only place where many members of the Latino  
15:27:27 3 population feel like they can communicate and feel  
15:27:32 4 comfortable. Our clinic does only first trimester  
15:27:36 5 abortions. It is set up to do a very simple, frankly,  
15:27:42 6 medical procedure that does not take much time. Many of  
15:27:45 7 the regulations are simply inapplicable to our clinic.  
15:27:49 8 And so, we would ask the court to take that into account  
15:27:53 9 as well. Your Honor, abortions have been safely  
15:27:56 10 performed in the building at 7th and Central for  
15:27:59 11 21 years. The time line that has been set up in this  
15:28:02 12 case is absurd. The final regulations were received on  
15:28:09 13 June 20th, and compliance in full was expected by  
15:28:13 14 July 1st. Frankly, Your Honor, that would require the  
15:28:16 15 skills of a magician, and what my clinic has is a  
15:28:20 16 dedicated staff, a registered nurse, and a very  
15:28:24 17 dedicated physician. There are no magicians there. So,  
15:28:29 18 Your Honor, we respectfully request that you enter the  
15:28:34 19 emergency relief requested, and that these clinics and  
15:28:41 20 other providers are able to continue providing this very  
15:28:45 21 necessary service to the women of Kansas. Again, we  
15:28:50 22 don't believe this has anything to do with the health  
15:28:53 23 and safety. There has been no time to comply. My  
15:28:57 24 client desires to comply, frankly, and was denied even  
15:29:01 25 an inspection.

15:29:02 1 Your Honor, I will draw your attention to  
15:29:04 2 one fact that we are addressing rapidly. The statute  
15:29:08 3 requires the physician to have clinical privileges at a  
15:29:12 4 hospital within 30 miles. We anticipate that that issue  
15:29:15 5 is going to be resolved within days, perhaps within, you  
15:29:19 6 know, the next week or so. We've been working very hard  
15:29:22 7 on that. There has been no more need for our physician  
15:29:25 8 to have clinical privileges at a hospital than a  
15:29:29 9 dermatologist who treats teen-age acne, but we are  
15:29:33 10 complying with that, don't seek to litigate that, and do  
15:29:38 11 seek Your Honor's order as requested. Thank you.

15:29:50 12 THE COURT: At this time, Mr. Chanay, on  
15:29:52 13 behalf of -- Mr. Fabert?

15:29:55 14 MR. CHANAY: Mr. Fabert will be arguing.

15:29:57 15 THE COURT: Mr. Fabert.

15:29:59 16 MR. FABERT: Thank you, Your Honor. I want  
15:30:08 17 to distinguish here today the statute and the  
15:30:15 18 regulations. As I understand their motion and the  
15:30:18 19 argument, the challenge is to the regulations, but there  
15:30:21 20 is no challenge being made to the statute. I don't read  
15:30:31 21 the statute the same way the plaintiffs do. And I'm not  
15:30:35 22 sure I read the primary case that they rely on the same  
15:30:38 23 way either. We have a statute here whose most important  
15:30:43 24 provision is the Statute Seven that relates to the  
15:30:47 25 limitation on lawfully performed abortions. It starts

15:30:52 1 with an exemption for all true medical emergencies. If  
15:30:58 2 we have any women who are suffering from true medical  
15:31:02 3 emergency, those abortions can go forward unregulated  
15:31:06 4 without the requirement of the license for the facility.  
15:31:12 5 The statute creates a regimen of facilities licensing.  
15:31:18 6 That is different from the board of healing arts which  
15:31:22 7 has regulatory authority over physicians, and which  
15:31:26 8 regulates the conduct of the doctors. The facilities  
15:31:30 9 are going to have separate licensing, and separate  
15:31:35 10 oversight by the department of health and environment.  
15:31:38 11 And that's why it misses the point to talk about the  
15:31:43 12 extent to which the doctors are all ready subject to  
15:31:46 13 regulations by the board of healing arts. They always  
15:31:50 14 have been subject to regulation by the board of healing  
15:31:52 15 arts. They're going to continue to be subject to that  
15:31:54 16 regulation. Those regulations and that agency have  
15:31:58 17 nothing to do with overseeing the facilities. It just  
15:32:03 18 so happens, coincidentally, the plaintiffs in this case  
15:32:07 19 are both the physicians who perform the abortions and  
15:32:10 20 the owners of the facilities. That could be otherwise.  
15:32:14 21 We could have a circumstance where a new applicant for  
15:32:19 22 licensing does not have the coincidence where the  
15:32:24 23 physicians performing the abortion are also the owners  
15:32:26 24 and operators of the facility. The regulations that  
15:32:31 25 have to be adopted by the department of health and

15:32:34 1 environment have to address not just the specialized  
15:32:39 2 concerns of these plaintiffs, they have to also address  
15:32:44 3 the issue of any and all future applicant for licensing  
15:32:48 4 under the statute. We need sufficiently explicit,  
15:32:53 5 clear, understandable regulations that can be complied  
15:32:57 6 with not just by these individuals but also by all  
15:33:01 7 future applicants. We are, of course, caught coming and  
15:33:06 8 going between a potential objection that the regulations  
15:33:10 9 are too vague and objection that the regulations are too  
15:33:15 10 specific. If the regulations did not include  
15:33:20 11 definitions of what the facilities ought to look like,  
15:33:22 12 they would be challenged as unreasonably vague. Because  
15:33:28 13 the temporary regulations do specify what the facilities  
15:33:31 14 ought to look like, they're now challenged as being too  
15:33:34 15 specific. I think the fact that these plaintiffs are  
15:33:39 16 not pursuing their administrative remedies in front of  
15:33:44 17 the KDHE is proof that the real grievance here is  
15:33:49 18 against the statute, not against the regulations. There  
15:33:53 19 is no grievance that arises from the lack of sufficient  
15:34:00 20 time to comply with this statute. They do not want to  
15:34:04 21 comply with the statute ever. They do not want  
15:34:08 22 additional time to comply with the statute. They want  
15:34:12 23 to be permanently relieved of the obligation ever to  
15:34:16 24 comply with the statute. That is something the  
15:34:20 25 department of health and environment cannot do for them

15:34:23 1 under any circumstances.

15:34:28 2           There is no fair reading of this statute  
15:34:31 3 that would authorize the department of health and  
15:34:34 4 environment to create out of thin air a process for  
15:34:37 5 granting case by case exceptions and waivers. No such  
15:34:42 6 waiver provision has been included in the statute. And  
15:34:46 7 for that reason, you can't criticize KDHE for failing to  
15:34:50 8 grant waivers and exception. The ultimate question,  
15:34:55 9 because we are in US District Court and the state of  
15:34:59 10 Kansas is the defendant, is whether there is a  
15:35:02 11 constitutional violation, not merely is there an  
15:35:08 12 arguable harm that could be addressed in a court case.  
15:35:12 13 Court does not have jurisdiction to award tort damages  
15:35:14 14 under the Eleventh Amendment. We're here solely for  
15:35:19 15 injunctive relief consistent with the Eleventh  
15:35:23 16 Amendment, and the question is whether the state is  
15:35:26 17 acting unconstitutionally, enacting and enforcing this  
15:35:32 18 statute.

15:35:33 19           Now, as I read the Planned Parenthood versus  
15:35:38 20 Drummond case, the Missouri case that's been relied on,  
15:35:43 21 Judge Smith specifically held that he believed those  
15:35:46 22 plaintiffs would fail in their facial challenge to the  
15:35:51 23 statute. That statute required all abortion providers  
15:35:56 24 in the state of Missouri to comply with the standard for  
15:36:00 25 ambulatory surgical centers. I'm looking at the

15:36:09 1 September 24, 2007 decision in that case, 2007 Westlaw  
15:36:15 2 2811407. The fourth page of that opinion states, the  
15:36:22 3 court holds that PPK does not have a probability of  
15:36:28 4 success of establishing these facial claims. It goes on  
15:36:34 5 further to say, for plaintiffs to succeed, the court  
15:36:36 6 would have to determine the statute, and intended  
15:36:40 7 regulations cannot be justified as a legitimate health  
15:36:43 8 or safety measure. The court does not believe  
15:36:46 9 plaintiffs will carry their heavy burden. Further into  
15:36:50 10 that opinion, the judge pointed out that it is  
15:36:54 11 reasonable to have regulations that require all  
15:36:59 12 facilities where surgery is performed to abide by the  
15:37:03 13 same regulations. What we're really here today about is  
15:37:09 14 an argument that these plaintiffs are entitled to a  
15:37:13 15 grandfather provision that is not in the statute, that  
15:37:17 16 they are constitutionally entitled to a grandfather  
15:37:19 17 provision that tells them that they are never, ever  
15:37:23 18 going to be required to comply with current law, that  
15:37:27 19 the law cannot be updated in any way that would restrict  
15:37:32 20 their ability to keep performing their day to day  
15:37:35 21 activities in the way they've been accustomed to.  
15:37:39 22 Kansas law has never recognized a right protected by law  
15:37:45 23 to perform medicine the way these plaintiffs have been  
15:37:48 24 performing it. To the extent they've been lawfully  
15:37:52 25 performing it, that's been primarily as a result of



15:37:54 1 judicial decisions that restrict past statutes that made  
15:37:59 2 abortion illegal. We don't have a protected property  
15:38:04 3 interest here in the business that these plaintiffs are  
15:38:08 4 engaging in. They do not have existing licenses that  
15:38:11 5 tell them that they have a -- a state guaranteed right  
15:38:15 6 to engage in the business of providing abortions. The  
15:38:24 7 state of Kansas does have the right to regulate  
15:38:26 8 abortions. Judge Smith noted that in his decision.

15:38:30 9 The only question is whether they're going  
15:38:33 10 to regulate abortions under a uniform rule applicable  
15:38:37 11 both to these plaintiffs and to ambulatory surgical  
15:38:41 12 centers, or whether instead, this court is going to  
15:38:44 13 compel the state to create exceptions that apply only to  
15:38:51 14 these plaintiffs and to no one else, to let them operate  
15:38:53 15 the way they want to, free of all oversight and  
15:38:58 16 regulation of the way their facilities are structured,  
15:39:01 17 maintained and operated.

15:39:06 18 The standard for a temporary injunction, the  
15:39:10 19 standard for temporary restraining order require there  
15:39:15 20 to be a finding of irreparable harm, not just some harm,  
15:39:18 21 but irreparable harm. The statute says that all medical  
15:39:23 22 emergencies can go forward unlicensed. Statute also  
15:39:27 23 says that unlicensed facilities can perform five first  
15:39:33 24 trimester abortions every month without transgressing  
15:39:36 25 the regulations or the statute. I think I have a

15:39:40 1 different idea of what irreparable harm is than the  
15:39:43 2 plaintiffs have put forward. It is not enough to show  
15:39:48 3 that there is some harm. The harm must be a harm that  
15:39:53 4 cannot be remedied in any other way other than the  
15:39:57 5 issuance of the temporary restraining order, and that  
15:40:01 6 simply is not true in this case.

15:40:04 7 We cited the court to the case of State, ex  
15:40:08 8 rel, Schneider versus Liggett. One of the key holdings  
15:40:11 9 of that case from 1976 was the Kansas administrative  
15:40:15 10 agencies have no jurisdiction to decide constitutional  
15:40:18 11 challenges. The constitutional challenges must be  
15:40:21 12 brought for the first time when an administrative case  
15:40:25 13 has first been transferred to the district court on  
15:40:27 14 appeal. That's what ought to be done in this case.  
15:40:31 15 These plaintiffs should proceed to exhaust their  
15:40:35 16 administrative remedies, and then if they don't get a  
15:40:38 17 license, they should appeal to the district court. The  
15:40:44 18 district court can then entertain their constitutional  
15:40:46 19 challenges and decide whether this statute needs to have  
15:40:52 20 a grandfather clause read into it in order to comply  
15:40:55 21 with due process. KDHE cannot do that for them. It  
15:41:00 22 lacks the authority to do it.

15:41:07 23 I have never heard of a regulated industry  
15:41:13 24 being granted a due process right to craft the  
15:41:17 25 regulations that apply to them, which is what I see in

15:41:21 1 the motion, that due process would require that these  
15:41:25 2 regulations actually result from a meet and confer of  
15:41:31 3 some kind with the regulated businesses. That is not my  
15:41:35 4 understanding of due process. Due process comes when  
15:41:44 5 the protected interest, whether it's the liberty  
15:41:47 6 interest or property interest, is threatened, or the  
15:41:50 7 government takes action, the government affords due  
15:41:54 8 process at that time.

15:41:56 9 The government does not afford due process  
15:41:58 10 to everyone by inviting their lobbyists into the  
15:42:03 11 legislative process. That is not where due process  
15:42:06 12 applies. Likewise, due process does not mandate that  
15:42:11 13 there be a -- a prior comment period before a regulation  
15:42:16 14 is made effective. I see no evidence whatever to  
15:42:28 15 support the contention that either the statute or the  
15:42:32 16 regulation was designed to make access more difficult.  
15:42:37 17 In fact, the reply brief that was filed today agrees  
15:42:42 18 with my own reading of the statute that the real purpose  
15:42:46 19 is to try to bring all abortion clinics under a single  
15:42:50 20 standard of professionalism, that being the standard of  
15:42:55 21 professionalism historically present in ambulatory  
15:42:59 22 surgical centers. If there is no medical emergency in  
15:43:09 23 this case, there is no irreparable harm. If there were  
15:43:18 24 a true medical emergency, the statute would not even  
15:43:21 25 apply.

15:43:29 1 This statute, these regulations, have  
15:43:33 2 nothing whatever to do with abortion protesters at all.  
15:43:38 3 The fact that this statute does not address that  
15:43:42 4 completely distinct and separate subject has nothing to  
15:43:45 5 do with the lawfulness of these regulations. I think if  
15:44:00 6 the purpose here is to avoid any potential risk of  
15:44:04 7 prosecution for violation of the statute, we're probably  
15:44:09 8 missing at least one party. That would, I assume, be  
15:44:13 9 the prosecutor in Wyandotte County. But again, I don't  
15:44:19 10 really think that that's why we're here today. What  
15:44:22 11 we're here today is to address whether the department of  
15:44:25 12 health and environment ought to be restrained and  
15:44:28 13 prevented from going forward with the administrative  
15:44:30 14 process of hearing the administrative appeal from denial  
15:44:35 15 of the application for permits. I think that would be a  
15:44:39 16 mistake. I think it would be an unnecessary  
15:44:42 17 complication in the procedural posture of this case. I  
15:44:46 18 think the right thing to do is not to restrain the  
15:44:51 19 department of health and environment, to go ahead and  
15:44:55 20 have the appeals prosecuted in the normal course so that  
15:44:59 21 we can see what the outcome of those administrative  
15:45:02 22 appeals are. Then whichever party feels aggrieved by  
15:45:08 23 the outcome of the administrative appeal can pursue  
15:45:12 24 additional relief in the district court, presumably the  
15:45:17 25 District Court of Shawnee County, and at that time,

15:45:21 1 constitutional challenges to the interpretation and  
15:45:23 2 application of the statute can properly be raised, and  
15:45:27 3 the court can hear what a Kansas judge thinks this  
15:45:32 4 statute really means.

15:45:37 5 If I read the -- the factual materials  
15:45:42 6 correctly, I think the witnesses that are being offered  
15:45:46 7 in support of this motion are in agreement with me. If  
15:45:49 8 I read the contractor's affidavit, it's the first  
15:45:53 9 attachment, the contractor says he's looked at the  
15:45:56 10 regulations, and they -- he says these regulations  
15:45:59 11 appear to him to be perfectly ordinary and normal  
15:46:03 12 requirements for an ambulatory surgical center. He  
15:46:09 13 said, that's right. That's -- that means they've done  
15:46:12 14 their job correctly. The purpose of the regulations is  
15:46:16 15 essentially to bring into alignment the practice in  
15:46:22 16 individual doctor's offices with the practice in  
15:46:25 17 ambulatory surgical centers, that that's the level of  
15:46:31 18 health care that the legislature of the state wants to  
15:46:35 19 see afforded in every abortion facility operating in  
15:46:40 20 this state. To the extent that is inconsistent with  
15:46:48 21 operating a comparatively small doctor's office, that  
15:46:54 22 grievance would have to be taken up with the Kansas  
15:46:56 23 legislature, not with the department of health and  
15:46:59 24 environment.

15:47:01 25 There is no way for the KDHE to draft and

15:47:05 1 adopt regulations that carry out the orders of the  
15:47:10 2 Kansas legislature without having substantially what  
15:47:17 3 these regulations say. If there is any wiggle room  
15:47:21 4 there, I'm sure that all the proceedings in this case  
15:47:24 5 will be taken into account in drafting any changes of  
15:47:31 6 the permanent regulations that will take the place of  
15:47:33 7 the temporary regulation. But the notion that this is  
15:47:37 8 somehow a facially obvious due process violation, I  
15:47:45 9 think is clearly erroneous. There is not a single case  
15:47:50 10 that has been offered up here that holds that this kind  
15:47:55 11 of statute and these regulations, regulations similar to  
15:47:59 12 this, are due process violations. I might point out  
15:48:04 13 that what the Planned Parenthood case really held was  
15:48:08 14 that to the extent non-surgical abortions were being  
15:48:11 15 performed in one of those plaintiffs' facilities, those  
15:48:15 16 would not appropriately be subject to the same rules and  
15:48:17 17 regulations as the -- the rules applicable to surgical  
15:48:21 18 facilities. But in the course of that holding, Judge  
15:48:25 19 Smith specifically included that everyone who performs  
15:48:29 20 surgical abortions deserves to be subjected to the same  
15:48:33 21 rules and regulations as every other surgical facility  
15:48:37 22 in the state of Missouri.

15:48:39 23 I don't know how that case can be cited for  
15:48:42 24 the proposition that there is some sort of property  
15:48:46 25 right in continuing to operate a private medical office

15:48:55 1 that falls far short of the requirements of an  
15:48:59 2 ambulatory surgical center as an abortion facility. We  
15:49:09 3 have a lot of speculation about patients who might or  
15:49:13 4 might not be allowed to go to the place they would  
15:49:20 5 prefer to go for their abortion.

15:49:23 6 I am not aware of any irreparable harm that  
15:49:26 7 is suffered by being required to go to an ambulatory  
15:49:31 8 surgical center rather than going to a doctor's office  
15:49:35 9 for an abortion. I do not know that one facility is any  
15:49:42 10 more subject to the potential for screaming protesters  
15:49:46 11 as opposed to the other.

15:49:52 12 The standard in the Tenth Circuit for the  
15:49:56 13 issuance of temporary restraining order is plain, and it  
15:50:02 14 is what we've cited the court to, the Aid for Women case  
15:50:06 15 from 1996. It is not enough to just say that some  
15:50:14 16 privacy interest is implicated in the enforcement of the  
15:50:18 17 statute. Considerably more detailed showing is required  
15:50:25 18 before the TRO can be issued by a US District Court here  
15:50:28 19 in the state of Kansas, unlike apparently, the standard  
15:50:32 20 they're applying in Missouri.

15:50:36 21 We think it would be a mistake to bring to a  
15:50:40 22 halt the administrative process at the state level. We  
15:50:44 23 think it's extremely important that this administrative  
15:50:46 24 process be allowed to play itself out. I am aware of no  
15:50:50 25 threat of prosecution of any of these plaintiffs. We

15:50:55 1 have nothing from any of the interested prosecutorial  
15:51:00 2 agencies suggesting that they're waiting to swoop down  
15:51:03 3 on someone, close their building, arrest them and throw  
15:51:06 4 them in jail. Kansas courts are perfectly competent to  
15:51:14 5 address due process concerns. If there really are  
15:51:19 6 grandfather clause concerns under the statute, they can  
15:51:25 7 be addressed by the Shawnee County District Court. They  
15:51:28 8 don't have to be addressed first and foremost here in  
15:51:32 9 this court.

15:51:34 10 Without a fully developed administrative  
15:51:38 11 record, we will never know whether either of the  
15:51:42 12 facilities operated by these plaintiffs has any hope  
15:51:45 13 ever of being licensed consistent with the statute and  
15:51:49 14 the regulations. They have outlined what they consider  
15:51:54 15 the reasons that they think would probably impose a  
15:52:01 16 burden on them in seeking to be licensed, but we will  
15:52:05 17 never know until we've seen the entire administrative  
15:52:08 18 record filled out whether the real reason they don't  
15:52:13 19 have a license issued, assuming there is no license  
15:52:18 20 issued, is because they didn't have enough time, or  
15:52:21 21 whether instead, their grievance is that no matter how  
15:52:24 22 much time they're allowed, they have no intention of  
15:52:27 23 complying with the statute.

15:52:34 24 I'd like to see this case resolved in as  
15:52:39 25 expeditious and final a way as possible, I think it



15:52:42 1 would be a mistake to shut down the administrative  
15:52:45 2 process prematurely, and that's why I think that because  
15:52:50 3 there is no threat of eminent enforcement, no one is  
15:52:55 4 being threatened with going to jail, medical emergencies  
15:52:59 5 are all ready addressed in the statute, we do not have  
15:53:05 6 any reason to believe that irreparable harm will follow  
15:53:09 7 if we let the administrative process play out, that  
15:53:12 8 that's the right course. And if expedited hearings are  
15:53:16 9 needed, all plaintiffs need do is ask for them. We have  
15:53:20 10 a highly cooperative office of administrative hearings,  
15:53:23 11 and we can do what it takes to get the issues resolved  
15:53:29 12 as quickly as possible, and then come back to this  
15:53:32 13 court, if necessary, with a fully developed  
15:53:35 14 administrative record. Thank you.

15:53:39 15 THE COURT: Court had given 30 minutes per  
15:53:42 16 side. In light of the time that we've used, I am going  
15:53:46 17 to ask the parties if they wish, they can respond to  
15:53:49 18 each other's arguments at this time. Give you some  
15:53:52 19 additional time. Five minutes.

15:53:56 20 MS. WOODY: Sure. Your Honor, I just want  
15:54:27 21 to address a couple of things that Mr. Fabert mentioned.  
15:54:30 22 First of all, the defendants cannot prevail in this case  
15:54:33 23 by mischaracterizing the plaintiff's claims. This is  
15:54:35 24 not a facial challenge to the statute. This is an as  
15:54:38 25 applied statute to the -- the particular way the KDHE

15:54:42 1 has implemented the licensing provisions of the act and  
15:54:45 2 the temporary regulations as adopted. Secondly,  
15:54:50 3 Mr. Fabert argues that there's no irreparable harm to  
15:54:53 4 patients because they can simply choose another abortion  
15:54:56 5 facility or they can get a medical emergency exception,  
15:54:59 6 and implies somehow that the two women that we discussed  
15:55:02 7 in the first part of the argument could somehow get some  
15:55:04 8 kind of a waiver in that respect. But if you look at  
15:55:07 9 the statute, it says only where there's -- the woman is  
15:55:10 10 in danger of eminent death or impairment of a major  
15:55:14 11 bodily function could she get a waiver for an emergency  
15:55:19 12 abortion.

15:55:20 13 In this instance, these abortions are  
15:55:22 14 medically indicated, but would not fall within the  
15:55:25 15 definition of the regulations, and therefore, would not  
15:55:30 16 be able to -- she would not able to get an abortion --  
15:55:38 17 would not be able to get an abortion on a medical  
15:55:40 18 emergency basis.

15:55:43 19 I want to take issue with the idea that the  
15:55:45 20 board of healing arts does not regulate the facilities.  
15:55:48 21 As the court looks at the chart that we've given the  
15:55:51 22 court, clearly it does. That's the reason for the  
15:55:53 23 inspections coming out. If you look at the -- for  
15:55:56 24 instance, at the issue of procedure room size, you can  
15:55:58 25 see that the procedure room size is spoken to in the

15:56:03 1 Kansas regulations for office space surgery. It is, of  
15:56:06 2 course, not nearly as stringent as the 150 square feet  
15:56:09 3 requirement that's in the -- the temporary regulations,  
15:56:12 4 but nor is that as stringent as -- nor is the one for  
15:56:18 5 hospitals as stringent. There's nothing about that  
15:56:21 6 regulation that is appropriate in this case, and there's  
15:56:24 7 nothing that would mandate such a regulation in light of  
15:56:28 8 the other regulations specifically for office space  
15:56:31 9 surgeries.

15:56:32 10 With respect to the argument that there's no  
15:56:38 11 due process argument here, and that we should go through  
15:56:41 12 the administrative route, it is the court's obligation  
15:56:44 13 to address the constitutional issues under due process.  
15:56:48 14 The idea that the plaintiffs here are seeking some  
15:56:51 15 special treatment is not -- is not true. Here you have  
15:56:54 16 regulations that were adopted that gave the providers  
15:56:59 17 nine days to come in compliance with regulations that  
15:57:02 18 would have totally meant total remodeling of their  
15:57:06 19 facilities. There is no due process in that. The  
15:57:09 20 regular -- the regular procedure for adopting  
15:57:12 21 regulations, with public comment going forward with  
15:57:17 22 that, and then having permanent regulations entered at  
15:57:21 23 some time in the future, that's the regulations that we  
15:57:24 24 are asking the court to have the Kansas -- the state of  
15:57:27 25 Kansas follow, not that they adopt some temporary

15:57:30 1 regulations that in effect shut these folks down.

15:57:34 2 There is irreparable harm to the doctors.

15:57:36 3 If you look at Judge Smith's opinion, he clearly says

15:57:39 4 that because of the Eleventh Amendment, as it's stated

15:57:41 5 -- as stated, they don't have an opportunity to come in

15:57:44 6 here for tort damages. So, for instance, any lost

15:57:47 7 revenues to the -- to the doctors are irreparable harm

15:57:50 8 because they can never recoup those while they go

15:57:53 9 through the administrative procedures that the state is

15:57:55 10 talking about. So, clearly there is irreparable harm

15:57:58 11 there. There clearly is irreparable harm to women

15:58:02 12 seeking abortions and access to abortions in this state

15:58:05 13 by way of the temporary regulations. And as we've said,

15:58:08 14 there is absolutely no reason for the court to let

15:58:14 15 them -- to not give injunction in this case and let the

15:58:17 16 case go forward, if there is any other information the

15:58:20 17 court needs, that it will be developed throughout --

15:58:23 18 throughout this procedure, it's clear, and plaintiff

15:58:27 19 stated in their brief, this court has discretion to

15:58:31 20 enter injunctive relief when it's appropriate. If ever

15:58:35 21 there was a case where injunctive relief is appropriate,

15:58:37 22 where the state should be restrained from enforcing

15:58:41 23 these temporary regulations in nine days when it's

15:58:46 24 impossible for the plaintiffs to comply, this is such a

15:58:49 25 case. If you look at Judge Smith's opinion, it doesn't

15:58:52 1 say what the state said. There, he found that the same  
15:58:55 2 kinds of regulations, the same kinds of restrictions,  
15:58:59 3 because they didn't provide for ample time for the  
15:59:01 4 plaintiffs to comply and because they didn't provide for  
15:59:06 5 an opportunity for them to seek waivers, likely would be  
15:59:10 6 unconstitutional.

15:59:10 7 There's no difference between the  
15:59:12 8 regulations at issue here and those that were at issue  
15:59:16 9 in front of the Western District of Missouri with  
15:59:18 10 respect to the -- the constitutionality of those --  
15:59:23 11 those issues.

15:59:23 12 Clearly, we believe that there is likelihood  
15:59:27 13 of success on both the due process and the undue burden  
15:59:30 14 issues, and we respectfully request that the court grant  
15:59:33 15 injunctive relief.

15:59:35 16 THE COURT: Mr. Fabert?

15:59:38 17 MR. FABERT: Well, I just want to address  
15:59:51 18 this notion that we are mischaracterizing the relief  
15:59:54 19 that was being requested here. Umm, the relief that's  
15:59:59 20 being requested here is permanent, permanent,  
16:00:05 21 non-enforcement of the statute. Plaintiffs are not  
16:00:09 22 asking for a schedule, for a reasonable length of time  
16:00:14 23 for the KDHE to tell them exactly what they need to do  
16:00:18 24 to come into compliance and to get licenses. They have  
16:00:22 25 made it very plain that the reason they consider their

16:00:24 1 harm to be irreparable is the fact that they cannot  
16:00:28 2 under any reasonable circumstances comply with any  
16:00:32 3 anticipated version of the regulations. This nine day  
16:00:37 4 argument is, therefore, a red herring. We could have  
16:00:40 5 given them nine months, and their objection would be  
16:00:43 6 identical.

16:00:44 7 They do not care how much time they're  
16:00:47 8 allowed. They do not want to come into compliance ever.  
16:00:52 9 They want this court to tell them they don't ever have  
16:00:54 10 to remodel their facilities to make them look more like  
16:00:59 11 an ambulatory surgical center.

16:01:07 12 The only reason -- the only reason damages  
16:01:11 13 are not available is because these plaintiffs have  
16:01:14 14 chosen the forum of US District Court. If they thought  
16:01:18 15 they needed a money damages remedy, all they needed to  
16:01:22 16 do was to start the proceedings in state court, because  
16:01:25 17 there is no Eleventh Amendment immunity in state court.  
16:01:29 18 It is their decision to choose this forum of limited  
16:01:33 19 jurisdiction that limits the extent of their remedy, not  
16:01:38 20 anything the state has done.

16:01:42 21 Once more, if the issue is the regulations  
16:01:46 22 and the behavior of the Kansas Department of Health and  
16:01:49 23 Environment, there can be no criticism of their conduct.  
16:01:55 24 It is not due process for them to overstep the authority  
16:01:59 25 entrusted them by the legislature of the state of

16:02:02 1 Kansas. They have no power to grant waivers. They have  
16:02:04 2 no power to grant grandfather clauses. They have no  
16:02:10 3 power to entertain constitutional challenges to this  
16:02:13 4 statute. Only the District Court of Shawnee County can  
16:02:18 5 entertain the constitutional challenges in the first  
16:02:22 6 instance. That is what needs to occur here to give  
16:02:25 7 these plaintiffs all the remedy that they're entitled  
16:02:29 8 to, and the sooner we reach that point, then they will  
16:02:33 9 get all the remedy the law will ever allow them. Thank  
16:02:38 10 you.

16:02:41 11 THE COURT: What the court would like to do  
16:02:43 12 at this time is then -- appreciate the parties  
16:02:46 13 accommodating the court's schedule -- if I could take a  
16:02:49 14 recess to consider the arguments that have been made  
16:02:51 15 this afternoon, and then return and give you the court's  
16:02:55 16 ruling. Thank you.

16:02:56 17 (Whereupon court took a recess. Proceedings  
16:38:36 18 then continued as follows:)

16:38:36 19 THE COURT: We're back on the record. I  
16:38:59 20 want to thank the parties, counsel, for again  
16:39:02 21 accommodating the court in regards to our schedule for  
16:39:07 22 this afternoon, and also in regards to the expedited  
16:39:13 23 briefing that the court made a request of the parties.  
16:39:16 24 So, thank you for that. As I begin with the court's  
16:39:20 25 ruling, I will mention this for the record. We're at a

16:39:27 1 very early stage of these proceedings. The record has  
16:39:31 2 not been fully developed, and what is before the court  
16:39:37 3 is a request for preliminary relief. The court has  
16:39:44 4 reviewed the briefs, the evidence, and the relevant law.  
16:39:49 5 Court has heard the parties' arguments, and again, is  
16:39:52 6 now prepared to rule. I'd ask the parties to follow  
16:39:57 7 along. This will take me a little while here to get  
16:40:01 8 through.

16:40:02 9 To begin with, because defendants had notice  
16:40:05 10 of this hearing, filed written arguments and authorities  
16:40:10 11 regarding their position and are present, the court will  
16:40:16 12 consider plaintiff's motion which was entitled motion  
16:40:19 13 for a temporary restraining order and/or preliminary  
16:40:24 14 injunction, the court will consider it as one for a  
16:40:28 15 preliminary injunction.

16:40:30 16 The purpose of a preliminary injunction is  
16:40:32 17 to maintain the status quo pending the outcome of the  
16:40:37 18 case. Plaintiffs as the parties seeking the preliminary  
16:40:42 19 injunction bear the burden to establish, number one, a  
16:40:45 20 substantial likelihood of prevailing on the merits.  
16:40:49 21 Number two, irreparable harm unless the injunction is  
16:40:53 22 issued. Number three, the threatened injury outweighs  
16:40:57 23 the harm that the injunction may cause the opposing  
16:41:03 24 party. And number four, an injunction, if issued, will  
16:41:07 25 not adversely affect the public interest.



16:41:11 1 First, the court looks at the likelihood  
16:41:13 2 that plaintiffs will succeed on the merits of their  
16:41:15 3 claims. Plaintiffs base their injunction request on  
16:41:21 4 their claims that defendants violated plaintiffs'  
16:41:24 5 procedural and substantive due process rights and their  
16:41:30 6 patient's right to privacy. To succeed on the  
16:41:34 7 procedural due process claim under the Fourteenth  
16:41:38 8 Amendment, plaintiffs must establish that they possessed  
16:41:43 9 a protected interest such that the due process  
16:41:46 10 protections were applicable. If they make such showing,  
16:41:50 11 then they must show that they were not afforded an  
16:41:53 12 appropriate level of process. It's a case of Farthing  
16:41:58 13 versus City of Shawnee at 39 Fed 3rd 1131, an 1135, a  
16:42:04 14 Tenth Circuit case from 1994. Plaintiffs argue they  
16:42:09 15 have a property and liberty interest in the continued  
16:42:12 16 operation of their medical practice. The right to  
16:42:16 17 pursue a lawful business has long been recognized as a  
16:42:20 18 property right within the protection of the Fourteenth  
16:42:22 19 Amendment. Plaintiffs have provided evidence that their  
16:42:26 20 medical practice has been in operation, that they have  
16:42:29 21 been providing abortion services for approximately  
16:42:32 22 24 years. Based on the record presented, it appears  
16:42:38 23 plaintiffs have a protected interest in maintaining  
16:42:41 24 their business. Procedural due process requires notice  
16:42:45 25 and a pre-deprivation hearing before property interests

16:42:51 1 are negatively affected by governmental actors. At this  
16:42:55 2 stage of the litigation, plaintiffs have also provided  
16:43:00 3 the court with evidence to suggest that defendants did  
16:43:02 4 not afford them an appropriate level of process  
16:43:06 5 implementing the temporary regulations and licensing  
16:43:11 6 process. On the record presented, it appears defendants  
16:43:17 7 failed to provide plaintiffs with, arguably, any  
16:43:21 8 process, let alone adequate process. According to the  
16:43:25 9 record presented, plaintiffs wrote to KDHE regarding the  
16:43:31 10 act on May 17th, 2011, the day after the act was  
16:43:37 11 enacted. KDHE responded on May 26th, informing  
16:43:43 12 plaintiffs that the new regulations and licenses would  
16:43:47 13 become effective July 1st, which is today's date.  
16:43:52 14 Plaintiffs did not receive regulations until June 9th  
16:43:56 15 when they were given until Friday, June 17th to become  
16:44:00 16 familiar with the regulations, confirm compliance, and  
16:44:06 17 apply for a license. After the close of business on  
16:44:10 18 June 17th, KDHE sent plaintiffs a copy of the final  
16:44:14 19 temporary regulations and licensing process. These  
16:44:20 20 regulations imposed more, arguably, onerous requirements  
16:44:27 21 than the June 9th draft regulations. Plaintiffs asked  
16:44:34 22 for waivers, but were told no waivers would be given.  
16:44:40 23 There's no evidence in the record that plaintiffs were  
16:44:42 24 provided a meaningful notice or opportunity to be heard  
16:44:47 25 or give comment on the regulations. In addition to

16:44:51 1 guaranteeing fair procedures, the due process clause of  
16:44:54 2 the Fourteenth Amendment, quote, covers a substantive  
16:44:58 3 sphere as well, barring certain government actions,  
16:45:01 4 regardless of the fairness of the procedures used to  
16:45:04 5 implement them, end quote, case of Diaz versus City and  
16:45:09 6 County of Denver at 567 Fed 3rd 1169, at 1181, a Tenth  
16:45:16 7 Circuit case from 2009 which is quoting County of  
16:45:21 8 Sacramento versus Lewis at 523 U S 833 at 845, 1998  
16:45:26 9 Supreme Court case. In this case, the legislative  
16:45:31 10 enactment is required to bear a rational relation to the  
16:45:34 11 legitimate government interest. Plaintiffs argue the  
16:45:38 12 temporary regulations and licensing process requirements  
16:45:42 13 are medically unnecessary, unattainable and harmful to  
16:45:47 14 public health. Plaintiffs further argue that defendants  
16:45:50 15 have violated their substantive due process rights by  
16:45:53 16 implementing the requirements in a manner that prohibits  
16:45:57 17 plaintiffs from continuing to provide abortion services  
16:46:00 18 unless they meet onerous standards on a short amount of  
16:46:04 19 time. Plaintiffs contend number one, there's no medical  
16:46:08 20 need for the physical facility requirements; number two,  
16:46:13 21 it's impossible for them to comply with the physical  
16:46:16 22 facility requirements in time to obtain a license before  
16:46:21 23 the effective date of the act; number three, the  
16:46:24 24 physical facility requirements directly undermine public  
16:46:28 25 health by substantially impeding access to a lawful and

16:46:33 1 necessary medical procedure. Through affidavits,  
16:46:38 2 plaintiffs have presented evidence that the temporary  
16:46:41 3 regulations and licensing process requirements regarding  
16:46:45 4 the physical facilities where abortion services are  
16:46:49 5 performed are unique to those facilities, that the  
16:46:52 6 regulations for facilities to handle more complex and  
16:46:56 7 riskier procedures like hospitals do not contain  
16:46:59 8 physical facility requirements as strict and/or onerous  
16:47:04 9 as the temporary regulations and licensing process, and  
16:47:09 10 that the temporary regulations and licensing process  
16:47:13 11 physical facility requirements are not medically  
16:47:15 12 necessary. Defendants have not presented evidence that  
16:47:20 13 the additional requirements for the facilities where  
16:47:23 14 abortion services are provided are rationally related to  
16:47:27 15 a legitimate governmental interest. The evidence  
16:47:34 16 presented to the court is sufficient at this early stage  
16:47:39 17 of the proceedings to show a likelihood that plaintiffs  
16:47:43 18 will succeed on the merits of their due process claims.  
16:47:47 19 Because the court has found that plaintiffs have shown a  
16:47:51 20 likelihood that they will succeed on the merits of their  
16:47:53 21 due process claims, the court need not address  
16:47:57 22 plaintiff's right to privacy claim.

16:47:59 23 The court next considers whether plaintiffs  
16:48:01 24 will suffer irreparable harm if the court denies a  
16:48:04 25 preliminary injunction. The irreparable harm

16:48:06 1 requirement is satisfied if plaintiff shows a  
16:48:09 2 significant risk that it will experience harm that  
16:48:14 3 cannot be compensated after the fact by monetary  
16:48:17 4 damages. Irreparable harm can occur through loss of  
16:48:21 5 customer or good will as well as threats to a business's  
16:48:26 6 viability. Here, plaintiffs argue that absent an  
16:48:29 7 injunction, defendants will enforce the temporary  
16:48:32 8 regulations and licensing process immediately, harming  
16:48:36 9 plaintiffs by number one, forcing them to shut down  
16:48:38 10 their ongoing abortion services; number two, subjecting  
16:48:43 11 them to loss of revenues; number three, subjecting them  
16:48:46 12 to loss of future patients; and number four, damaging  
16:48:50 13 the professional standing. Plaintiffs also allege, in  
16:48:54 14 the absence of the requested injunction, their patients  
16:48:57 15 will be exposed to unnecessary health risks. The Kansas  
16:49:02 16 women will be unable to obtain abortion services in the  
16:49:05 17 state and/or in a private medical office setting, and  
16:49:09 18 public health will be threatened. Yesterday, KDHE  
16:49:16 19 issued a one year license to Comprehensive Health of  
16:49:19 20 Planned Parenthood of Kansas and Mid-Missouri, one of  
16:49:23 21 only two other facilities in Kansas that provides  
16:49:26 22 abortion services. Defendants argue that because  
16:49:30 23 Planned Parenthood was licensed, women will still be  
16:49:33 24 able to obtain abortion services in Kansas. They also  
16:49:37 25 argue that plaintiffs can seek to get a license to

16:49:40 1 perform abortion services at another facility. Thus,  
16:49:46 2 the defendants argue, the only remaining harm of  
16:49:49 3 plaintiffs is the speculative harm that plaintiffs will  
16:49:52 4 lose revenue and future clients, receive damage to the  
16:49:58 5 professional standing, and that there will be a threat  
16:50:00 6 to public health. Plaintiffs presented evidence that  
16:50:03 7 without an injunction, they would have to cease  
16:50:08 8 providing medical services today. KDHE informed  
16:50:12 9 plaintiffs this morning that they would be denied a  
16:50:15 10 license. They have patients scheduled to receive these  
16:50:19 11 services within the next week. According to the  
16:50:23 12 affidavit submitted, these services are often medically  
16:50:26 13 necessary, and a delay in the services creates a health  
16:50:30 14 risk for patients. There is evidence in the record of  
16:50:34 15 at least two women with fetal anomalies and serious  
16:50:38 16 medical complications that will suffer irreparable harm  
16:50:42 17 if an injunction is not issued. At least one of the  
16:50:47 18 plaintiffs performs 25 percent of these services in the  
16:50:51 19 state of Kansas. One plaintiff has been licensed, but  
16:50:55 20 the record indicates that that clinic does not have the  
16:50:59 21 specific expertise of plaintiffs Hodes and Nauser in  
16:51:06 22 performing certain complicated procedures, and is  
16:51:10 23 unlikely to be able to absorb the patients of both  
16:51:13 24 plaintiffs in the manner that will address the health  
16:51:15 25 concerns involved with dealing with delaying the

16:51:18 1 services to patients. There's also evidence that  
16:51:24 2 plaintiffs will lose revenue through future clients, and  
16:51:28 3 good will, and suffer harm to their professional  
16:51:31 4 reputation if they are forced to stop providing legal  
16:51:35 5 medical services. Based on the record presented, the  
16:51:38 6 court finds that plaintiffs have sufficiently shown that  
16:51:41 7 they will suffer irreparable harm unless a temporary  
16:51:45 8 restraining order is issued.

16:51:47 9 Next, the court looks at whether the  
16:51:49 10 threatened injury outweighs the harm that the temporary  
16:51:54 11 restraining order may cause defendants. If the court  
16:51:56 12 were to issue the requested orders, defendants would be  
16:51:58 13 prohibited, at least temporarily, from enforcing the  
16:52:01 14 temporary regulations and licensing process. There's no  
16:52:05 15 evidence that an injunction will impose any affirmative  
16:52:10 16 obligations, administrative burden or cost to  
16:52:13 17 defendants. The delay in enforcing the state's laws  
16:52:17 18 that might result from an injunction is not as great as  
16:52:20 19 the threatened harm to plaintiffs and their patients.  
16:52:23 20 An injunction would not prevent the regulation of  
16:52:26 21 plaintiff's medical services entirely. Plaintiffs would  
16:52:30 22 remain subject to existing regulatory requirements and  
16:52:34 23 government oversight. Any delay or interruption from  
16:52:38 24 the issuance of an injunction will be temporary pending  
16:52:42 25 the resolution of this action. The court finds that the

16:52:47 1 significance, certainty and reparability of the  
16:52:52 2 threatened harm outweigh any potential harm to  
16:52:56 3 defendants.

16:52:57 4 Finally, court will consider whether the  
16:52:59 5 injunction, if issued, would adversely affect the public  
16:53:02 6 interest. This action involves access to and regulation  
16:53:06 7 of medical services that directly affect the public  
16:53:09 8 interest. Although regulation of medical services is a  
16:53:13 9 recognizable public interest that would be affected by  
16:53:17 10 issuing the requested injunction, the court believes  
16:53:20 11 that the public's interest lies in preserving the status  
16:53:24 12 quo pending resolution of this case. As the court  
16:53:30 13 mentioned, if an injunction is issued, plaintiffs would  
16:53:33 14 remain subject to the existing regulatory requirements  
16:53:36 15 and government oversight. The court finds that  
16:53:40 16 restraining action on the temporary regulations and  
16:53:43 17 licensing process until the merits of this action can be  
16:53:48 18 resolved would not adversely affect the public interest.  
16:53:52 19 As a result of considering these factors, the court  
16:53:56 20 finds plaintiffs have established entitlement to the  
16:54:00 21 requested preliminary injunction. Plaintiff's motion is  
16:54:04 22 granted. Defendants and their agents and successors and  
16:54:09 23 office are temporarily restrained from enforcing the  
16:54:13 24 licensing requirements of Senate Bill Number 36, 2011  
16:54:18 25 bill, at Sections 2, 8 -- 2 and 8, and also enforcing



16:54:26 1 the temporary regulations and licensing procedures until  
16:54:30 2 a resolution of this action.

16:54:34 3 I would direct the parties to, in light of  
16:54:37 4 the court's ruling, contact the magistrate judge  
16:54:41 5 assigned to this case to request that a scheduling order  
16:54:46 6 regarding this case be set as soon as possible. Based  
16:54:53 7 on the court's ruling, at this time, is there any  
16:54:59 8 request or argument for a bond to be issued?

16:55:09 9 MR. FABERT: If it please the court, I think  
16:55:11 10 Federal Rule 65 C makes a posting of some bond  
16:55:19 11 mandatory, and there is no discretion to completely  
16:55:21 12 waive and dispense with the posting of a security bond.

16:55:27 13 THE COURT: Is there a request for a bond  
16:55:29 14 amount?

16:55:38 15 MR. FABERT: Umm, we think a nominal figure  
16:55:44 16 of \$25,000 would be sufficient.

16:55:46 17 THE COURT: In regards to your statement  
16:55:49 18 that the bond is mandatory, is that based on your  
16:55:55 19 reading of the rule or some other source?

16:56:01 20 MR. FABERT: I think the language of the  
16:56:03 21 rule states the court may issue a preliminary injunction  
16:56:06 22 or a temporary restraining order only if the movant --  
16:56:10 23 if the movant gives surety in an amount that the court  
16:56:15 24 considers proper. And so, the black letter language of  
16:56:17 25 the rule, I think, makes it obligatory to impose some

16:56:21 1 requirement on the security bond.

16:56:27 2 THE COURT: Thank you. Plaintiffs want to  
16:56:30 3 be heard in regards to a request that a bond be set at  
16:56:33 4 this time?

16:56:33 5 MS. WOODY: Yes, Your Honor. It's  
16:56:34 6 plaintiff's position that Rule 65 provides the court  
16:56:36 7 with discretion as to whether or not to enter a bond.  
16:56:39 8 Based on the court's finding that there is no  
16:56:41 9 affirmative action required by the state in this matter,  
16:56:44 10 and no damages -- that there would be no damages to the  
16:56:48 11 state from proceeding under the injunction, and as I  
16:56:51 12 believe that injunctions of this nature have been  
16:56:53 13 granted without bond as evidenced by the case that we  
16:57:00 14 have cited to you, which is Judge Smith in the Western  
16:57:02 15 District granted an injunction without a bond, and we  
16:57:07 16 would draw the court's attention to the Tenth Circuit  
16:57:10 17 case of Coquina Oil Corp versus Transwestern Pipeline  
16:57:14 18 Company, there's no bond necessary absent the proof of  
16:57:17 19 showing of likelihood of harm to the state.

16:57:21 20 THE COURT: Anything else?

16:57:23 21 MS. WOODY: No.

16:57:25 22 MR. FABERT: I don't believe so.

16:57:27 23 THE COURT: In regards to the rule, the rule  
16:57:29 24 has the language that you've put on the record,  
16:57:33 25 Mr. Fabert. I would tell you that courts have actually

16:57:37 1 weighed in, in regards to that language. I refer the  
16:57:41 2 record to a case of RoDa Drilling Company versus Siegal  
16:57:45 3 at 552 Fed 3rd 1203, at 1215, a Tenth Circuit case from  
16:57:51 4 2009, noting wide latitude of trial courts in  
16:57:56 5 determining whether to require a bond, despite what  
16:58:00 6 appears to be the plain reading of the rule. It appears  
16:58:07 7 to be something which this court has discretion based on  
16:58:12 8 the court's interpretation of the rule. Again, the  
16:58:15 9 court made its ruling. I believe in good faith the  
16:58:23 10 state has asked for a bond to be imposed. At this time,  
16:58:29 11 again, it's an early stage of these proceedings. The  
16:58:32 12 record's not fully developed. The court under these  
16:58:36 13 circumstances does not believe that a bond should be  
16:58:40 14 required. I don't believe that there's been a  
16:58:45 15 sufficient showing of likelihood of harm by the court  
16:58:49 16 not issuing the bond. Bond request has been considered  
16:58:52 17 by the court. At this time, at this hearing, that  
16:58:56 18 request is denied. If there's nothing else from the  
16:58:59 19 parties, this hearing's adjourned. Thank you.

16:59:08 20 MR. CHANAY: I'm sorry, Your Honor, I just  
16:59:10 21 had one question. Is the state free to continue under  
16:59:13 22 process of developing its permanent regulations by  
16:59:16 23 taking evidence from the public and comment on the  
16:59:18 24 regulations as they have intended for the -- for the  
16:59:22 25 permanent application? I would certainly understand

16:59:25 1 your ruling to keep them from implementing them, but may  
16:59:28 2 they at least continue on in the development process and  
16:59:32 3 taking public comment and information for those  
16:59:34 4 regulations?

16:59:38 5 THE COURT: I don't know if I need to hear  
16:59:39 6 from plaintiffs in regards to that, because I would find  
16:59:42 7 the plaintiffs have specifically addressed what relief  
16:59:46 8 they were requesting. I don't think the relief the  
16:59:48 9 court has granted in any way would interrupt or  
16:59:52 10 interfere with that part of the process from continuing.

16:59:56 11 MR. CHANAY: All right. Very good.

16:59:57 12 THE COURT: Anything else?

16:59:57 13 MR. CHANAY: No, Your Honor.

16:59:58 14 THE COURT: If there's nothing else, this  
17:00:00 15 hearing's adjourned. Thank you.

16 (Whereupon court recessed proceedings.)

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C E R T I F I C A T E

I, Nancy Moroney Wiss, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 52 typewritten pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED July 12, 2011.

S/\_\_\_\_\_

Nancy Moroney Wiss, CSR, CM, FCRR

NANCY MORONEY WISS, CSR, RMR, FCRR